

instruction and employed the machinery of the compulsory education laws to afford sectarian groups an invaluable aid.

The Court found that the use of tax-supported property for religious instruction aided sectarian groups and, therefore, was unconstitutional. Shortly following was the case of *Zorach v. Clauson*, 343 U.S. 306, which upheld a "released-time" program in which religious instruction was provided off the school premises. The Court, in its opinion, held that the encouragement of religious education when public property was not in use did not violate the First Amendment to the Constitution, but, rather, was a furtherance of our tradition of being a religious people. It is most respectfully submitted that a close analysis of the cases dealing with religious education show that nowhere is the State prohibited from determining qualifications of those who hold public office, even if those qualifications include a belief in the existence of God.

The Appellant claims that a requirement of belief in the existence of God prefers some religions over others, specifically theistic religions over those which are non-theistic. However, the very word "religion" as set forth in the Constitution of the United States and as defined by the decisions of this Court clearly will show that non-theism is not a religion as contended.

"The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to His will. * * *". *Davis v. Beason, supra*.
 See also *United States v. Ballard*, 322 U.S. 78.

"The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation." Mr. Chief Justice Hughes' dissenting opinion, *United States v. Macintosh, supra*.

QUERY: Was it the intent of the framers of the First Amendment that the existence of a Supreme Being should be negated and that a state recognition of God should be suppressed?

"* * * An attempt to level all religions, and to make it a matter of State policy to hold all in utter indifference would have created universal disappropriation, if not universal indignation." Story, *Commentaries on the Constitution*, Sec. 1874 (1833); citing 2 Lloyds Debates, 195, 196.

"By establishment of religion is meant the setting up or recognition of a state church, or at least conferring upon one church of special favors and advantages which are denied to others. * * * It was never intended by the Constitution that the Government should be prohibited from recognizing religion, * * * where it might be done without dragging any invidious distinctions between religious beliefs, organizations or sects." Cooley, *Principles of Constitutional Law*, 3rd Ed., 224-225 (1898).

See also:

Cooley, *Constitutional Limitations*, 8th ed., pp. 974-976 (1927).

It is respectfully submitted that the First Amendment was never conceived to negate a belief in the existence of a Supreme Being or to suppress state recognition in the existence of God. Governmental institutions, executive, legislative and judicial, all contemporaneously recognize and manifest a belief in the existence of a Supreme Being.

II.

The Appellant Has Not Been Denied Due Process of Law or Equal Protection of the Law as Guaranteed by the Fourteenth Amendment to the United States Constitution.

The Appellant claims that he has been denied due process of law and equal protection of the law in violation of the Fourteenth Amendment. He states that his inability

to qualify as a Notary Public denies equal protection of the laws and bars the State from granting said privilege to some while it withholds it from others. In *Garner v. Board of Public Works, supra*, this Court reiterated that the qualifications for state office were properly within the purview of the states. The Constitution of the United States did not guarantee public employment or office-holding. See also *Gerende v. Board of Supervisors of Elections, supra*; and *Slochower v. Board of Education, supra*. In *Taylor v. Beckham*, 178 U.S. 548, *supra*, this Court refused to assume jurisdiction to review a determination of state courts relative to the election of the Governor and Lieutenant-Governor of the State of Kentucky. The Court stated that the offices of Governor and Lieutenant-Governor of the State of Kentucky were not property or any other right which was protected by the Fourteenth Amendment to the Constitution. This Court in *Snowden v. Hughes*, 321 U.S. 1, in reviewing the rights of certain candidates to state office, held that such is a right or privilege of state citizenship and not of national citizenship, which is protected by the "Privileges and Immunities Clause". The Court concluded:

"More than forty years ago this Court determined that an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause. *Taylor & Marshall v. Beckham*, 178 U.S. 548, 44 L. ed. 1187, 20 S. Ct. 890, 1009. Only once since has this Court had occasion to consider the question and it then reaffirmed that conclusion, *Cave v. Missouri*, 246 U.S. 650, 62 L. ed. 921, 38 S. Ct. 334, as we reaffirm it now."

See also:

Hamilton v. University of California, supra.

The Appellant further contends that the requirement of a belief in the existence of God is unreasonable. This

argument falls by its own weight. As heretofore set forth, our national institutions which set forth the will and traditions of the nation clearly are based upon a reliance in the existence of God. To destroy or to judicially breach the customs and traditions of our people would in itself be unreasonable. The State of Maryland, as well as the other states of the union, may, through their collective voices, speak for a declaration in the existence of God.

As pointed out in the opinion of the Court of Appeals of Maryland, it would appear to be somewhat paradoxical if a Notary Public, who is given the power to administer oaths and certify thereto (Article 68, Section 3 of the Maryland Code, (1957 Ed.)), might qualify for this office where he disavows a belief in God and in the sanctity of the very oath he administers.

The public policy of the people of Maryland, as set forth in the Preamble to the Constitution of the State of Maryland, states:

"We, the people of the State of Maryland, grateful to Almighty God for our civil and religious liberty, and taking into our serious consideration the best means of establishing a good Constitution in this State with a sure foundation and more permanent security thereof, declare: * * *"

The public policy of religious belief is further pointed out by the marriage laws of Maryland, which by Article 62, Section 4 of the Maryland Code (1957 Ed.) provide that marriages may be solemnized in the State of Maryland by any minister of the gospel or official of a religious order or body, and it has been held that no marriage in the State of Maryland is valid without some sort of religious ceremony. See *Feehley v. Feehley*, 129 Md. 565, 99 A. 663; *Dennison v. Dennison*, 35 Md. 361; *Hender-*

son v. Henderson, 199 Md. 449, 87 A. 2d 403. Likewise, since our earliest history blasphemy has been made a crime (Article 27, Section 20, Code of Maryland, 1957 Ed.).

Can it be claimed that the public policy of the people of Maryland is unreasonable in requiring an oath of our public officers which reflects the public desire of a belief in the existence of God? If the Appellant's arguments are correct, any recognition by the State or National Government of the existence of God would violate the First Amendment to the Constitution. It is respectfully submitted that this interpretation was never intended by the founding fathers and that such interpretation would meet with universal indignation from the citizens of this nation.

III.

Article 37 of the Declaration of Rights of the Maryland Constitution Does Not Violate the Provisions of Article 6 of the Constitution of the United States.

Article 6, Clause 3, of the United States Constitution states that " * * * No religious test shall ever be required as a qualification to any office or public trust under the United States". The argument that this provision applies to the States was abandoned in the Court of Appeals of Maryland and, as held in the opinion of the Court of Appeals, it was not contended that Clause 3 of Article 6 of the Constitution was applicable to the states; nor, was it contended that this Article was part of the Fourteenth Amendment to the Federal Constitution. Since the matter was not passed upon by the Court of Appeals of Maryland and not ruled upon by that Court, it would be improper for this Court for the first time to rule on this contention. *Adler v. Board of Education*, 342 U.S. 485; *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450; *Nelson v. County of Los Angeles*, 362 U.S. 1.

The Appellant urges that the provisions of Article 6 Section 3 of the United States Constitution above referred to are applicable to the several states. This argument must fall by its own weight since the prohibition expressly applies only to offices held under the National Government. Its purpose was to cut off forever any pretense of alliance between any church and the National Government. The preceding clause of Section 3 of Article 6 requires that all legislative, executive and judicial officers of both the United States and of the several states are required to be bound by an oath or affirmation to support the Constitution of the United States, but the provision as to religious test applies only to any office of public trust under the United States. *Expressio unius est exclusio alterius*. If the framers of the Constitution had intended to have this clause apply to state officers, it would have used the language contained in the first clause of Section 3, *supra*.

CONCLUSION

It is respectfully submitted that the provisions of the Maryland Declaration of Rights now under attack in this Court are so fundamental to the beliefs of the State of Maryland, as well as to the nation as a whole, that any decision which would negate the recognition of the existence of God by public officers would create universal indignation. It is therefore respectfully submitted that the opinion of the Court of Appeals of Maryland should be affirmed.

Respectfully submitted,

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JAMES R. BOWLING, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1960

No. 373

ROY R. TORCASO, *Appellant*,

v.

CLAYTON R. WATKINS, *Appellee*.

On Appeal From the Court of Appeals of Maryland

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INDEX

	Page
I. The Irrelevancy of the Declaration of Independence	1
II. Setting Out the Form of an Oath With the Words "So Help Me God"—in <i>Haec Verba</i> Does Not Indicate Any Legislative Intent of a Qualification of a Belief in God	2
III. Denying Public Office to Those Who Refuse to Profess a Belief in God Infringes on Religious Freedom	8
IV. Appellee's Position Rests on the Theory of the Rejected Meaning of the "Establishment of Religion" Clause	12
V. The Religious Test Oath Denies Appellant the Equal Protection of the Law	15
VI. The "No Religious Test" Clause of Article 6 of the United States Constitution Was Raised in the Court Below	15
Appendix A	17

CITATIONS

<i>Abrams v. United States</i> , 250 U.S. 616, dissenting opinion of Mr. Justice Holmes, p. 630	11
<i>American Communications Assn. v. Douds</i> , 339 U.S. 384	8
<i>American Sugar Refining Co. v. Louisiana</i> , 179 U.S. 89	14
<i>Ashdown v. Manitoba Press Co.</i> , 6 Man. 578	5
<i>Blackburn v. State</i> , 71 Ala. 319, 321, 46 Am. Rep. 323, 39 Am. Jur. 494	4
<i>Bram v. United States</i> , 168 U.S. 532	3
<i>Cantwell v. Connecticut</i> , 310 U.S. 296	11
<i>Church of the Holy Trinity v. United States</i> , 143 U.S. 457 (1892)	1, 10
<i>Eaton v. Price</i> , 360 U.S. 246	15
<i>Everson v. Board of Education</i> , 330 U.S. 1 (1947) ..	11, 12, 13
<i>Fowler v. Rhode Island</i> , 345 U.S. 67	11
<i>Frost v. Railroad Commission of California</i> , 271 U.S. 583	9

<i>Garner v. Public Works</i> , 34 U.S. 716	8
<i>Gillars v. United States</i> , 182 F. 2d 962 (2nd Cir. 1950) ..	5
<i>Girouard v. United States</i> , 328 U.S. 61	10
<i>Hampegon v. Esquire, Inc.</i> , 327 U.S. 146 (1946)	9
<i>Hendrix v. State</i> , 50 Ala. 148	3
<i>Hudson v. State</i> , 207 Ark. 18, 179 S.W. (2d) 165	5
<i>In re Sage</i> , 24 Oh. Cir. Ct. (N.S. 7)	4
<i>Lancaster etc. R. Co. v. Keaton</i> , 8 E. & B. 952, 955, 92 E.C.L. Rep. 952, 120 Reprint 354	4
<i>Manhattan L. Ins. Co. v. Cohen</i> , 234 U.S. 123	16
<i>McCollum v. Board of Education</i> , 333 U.S. 203 (1948) ..	12
<i>O'Reilly v. People</i> , 86 N.Y. 154, 40 Am. Rep. 525	5
<i>People v. Parent</i> , 139 Cal. 600, 601, 73 Pac. 423	4
<i>People v. Swist</i> , 136 Cal. 520, 69 Pac. 223	4
<i>Petition of Plyrachi</i> , 205 F. 2d 423 (9th Cir. 1953), rev. 107 F. Supp. 593 (D. Hawaii, 1952); cf. 115 F. Supp. 613 (D. Hawaii, 1953)	3
<i>Raley v. Ohio</i> , 360 U.S. 423 (1959)	16
<i>Schwimmer v. United States</i> , 279 U.S. 644	10
<i>Snowden v. Hughes</i> , 321 U.S. 1	14
<i>Spanaler v. Dist. Ct.</i> , 104 Ut. 584, 140 Pac. (2d) 755; 67 C.J.S. 4	4
<i>Speiser v. Randall</i> , 357 U.S. 513 (1958)	9
<i>State v. Collier</i> , 23 Wash. (2d) 678, 162 Pac. (2d) 267 ..	3
<i>State v. Hulsman</i> , 147 Iowa 572, 126 N.W. 700	4, 5
<i>State v. Mazon</i> , 90 N. Car. 676	4
<i>State v. Owen</i> , 72 N.C. 605, 612	3
<i>State ex rel. Braley v. Gay</i> , 59 Minn. 21, 60 N. W. 676 ..	4, 5
<i>Taylor v. Beckman</i> , 178 U.S. 548	14
<i>United States v. Amtorg</i> , 71 F. 2d 524 (C.C.P.A. 1934) ..	4, 5
<i>United States v. MacIntosh</i> , 283 U.S. 605, 625, specifi- cally overruled in <i>Girouard v. United States</i> , 328 U.S. 61	10
<i>United States ex rel. Milwaukee Social Democrat Pub- lishing Co. v. Burleson</i> , 225 U.S. 407	9
<i>Vaughn v. State</i> , 146 Tex. Cr. R. 586, 177 S.W. (2d) 59 ..	4
<i>Vidal v. Girard's Executors</i> , 2 How. 128	10
<i>West Virginia Board of Education v. Barnette</i> , 319 U.S. 624	11
<i>Zorach v. Clauson</i> , 343 U.S. 306	10, 12

Index Continued

iii

CONSTITUTIONAL PROVISIONS

CONSTITUTION OF THE UNITED STATES:	Page
Article II, section 1(8)	7
Article V	15
First Amendment	10
Fourteenth Amendment	11, 13, 14

CONSTITUTION OF MARYLAND:

Articles 36 and 37	11
--------------------------	----

STATUTES AND REGULATIONS

Act of July 11, 1868, 15 Stat. 85	7
Act of March 2, 1917 (39 Stat. 954 c. 145 § 10), as amended by Act of May 17, 1932 (47 Stat. 158 c. 190); 48 U.S.C. § 873	6
Act of July 30, 1947 (61 Stat. 643, c. 389, 4 U.S.C. § 101)	6
Act of June 25, 1948 (62 Stat. 907, c. 646); 28 U.S.C. § 453	7
Act of May 10, 1950 (64 Stat. 156 § 16(d) as amended by Act of April 5, 1952 (66 Stat. 43 C. 159 and as renumbered by Act of July 11, 1958 (72 Stat. 353, § 2 Public Law 85-510); 42 U.S.C. § 1874(d)	6
Act of January 12, 1951 (64 Stat. 1255 c. 1228 § 403(b), as amended by Act of March 5, 1952 (66 Stat. 13 c. 78 § 1(b)); 50 App. U.S.C., 1958 ed., § 2255(b)	6
Act of June 29, 1953 (67 Stat. 86 § 1); 50 App. U.S.C. 1958 ed. § 457(i) (7)	7
Act of July 22, 1954 (68 Stat. 509 c. 558 § 29); 48 U.S.C. 1958 ed., § 1543	6
Act of August 10, 1956 (70A Stat. c. 242); 10 U.S.C. § 4346(d)	6
Act of August 10, 1956 (70A Stat. c. 1041); 10 U.S.C. § 501	6
Act of August 10, 1956 (70A Stat. 602, c. 1041; 32 U.S.C. § 304	6
Act of July 7, 1960 (74 Stat. 353; Public Law 86-601	7
National Defense Education Act of 1958 (72 Stat. 1602 § 1001(f); Public Law 85-864); 20 U.S.C., 1958 ed., § 581(f)	5
Oaths Act of 1888, 51 & 52 Viet. c. 46	5
1 U.S.C. 1 § 1	2

	Page
R.S. § 1 (1873) based on Act of Feb. 25, 1871, c. 71, 16 Stat. 431	3
R.S. §§ 391, 392, as amended by Act of March 5, 1874 (18 Stat. 19 C. 46) ; 5 U.S.C. § 365	7
R.S. § 1757, as amended by Act of May 13, 1884 (23 Stat. 22, c. 46 §-2, 3) ; 5 U.S.C. § 16	7

MISCELLANEOUS

A & E Ann. Cas. 723, Note 5	3
Vol. XX, A.C.L.U. of Northern California News, #2, Feb. 1955	3
Bentham, <i>Swear Not At All</i> in V <i>Jeremy Bentham's Works</i> (Bowring Ed. 1843), 187	5
Black's L.D. (1951), 4th Ed., 81, 1220	4
Cooley's <i>Principle of Constitutional Law</i>	12
9 Encyclopedia of the Laws of England, Oaths, 248-52 (Renton ed. 1898)	5
9 Holdsworth, <i>A History of English Law</i> , 189-91 (1926)	5
McCormick, <i>Evidence</i> § 63 (1954)	5
Note, 36 N.Y.U. Law Review 513, 515 and footnotes ..	5
Pfeffer, <i>Church, State & Freedom</i> , pp. 109-12, 2091	2, 13
20 R.C.L. 508	3
White, Oaths in Judicial Proceedings, 42 (N.S.) Am. Law Reg. 373 (1903), and appendix 446	5

IN THE
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OCTOBER TERM, 1960

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ROY R. TORCASO, *Appellant*,

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CLAYTON R. WATKINS, *Appellee*.

On Appeal From the Court of Appeals of Maryland

REPLY BRIEF FOR APPELLANT

I. The Irrelevancy of the Declaration of Independence.

Whenever issues of church-state separation arise in the United States, invariably the Declaration of Independence and the references in it to a "Creator", "Supreme Judge" and "Divine Providence" are cited as justification for the position that our nation and government were founded on a belief in God.¹ Generally ignored are the circumstances under which the Declaration of Independence was drafted and the purpose of it. In 1776, little thought was given to the type of government which was to be established if the independence movement succeeded.

¹E.g., *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

When the Revolutionary War had ended and the time came to draft the Constitution for this new nation, no reference was made in it to a Supreme Being, in striking contrast to the references in the Declaration of Independence.

The omission was not accidental. It was a deliberate, conscious choice of the Constitutional Convention and was bitterly criticized by some during the debates in the States during its ratification.²

In drafting a Constitution, the men of 1787 were confronted with the task of creating a government for a pluralistic society—not merely breaking away from another country. It is to the Constitution with its Bill of Rights that we must look to resolve the issue in this case. The Declaration of Independence, for all its historical importance in breathing fire and spirit into the American Revolution, is for our present problem irrelevant.

II. Setting Out the Form of An Oath With the Words "So Help Me God"—in Haec Verba Does Not Indicate Any Legislative Intent of a Qualification of a Belief in God.

Appellee attempts to justify its position that a belief in God is a valid requirement for public office because many oaths set out in *totidem verbis* contain the words "So Help Me God", including oaths required under federal law.

However, appellee's conclusion is completely unwarranted. In the present 1 U.S.C. § 1, the following rule of construction is set forth:

"In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . oath includes affirmation, and sworn includes affirmed; . . ."

61 Stat. 633 (1947), amended 62 Stat. 859 (1948),
amended 65 Stat. 710 (1951); 1 U.S.C.A. § 1.

² Pfeffer, *Church, State & Freedom*, pp. 109-112, 209.

This rule that a "requirement of an oath shall be deemed complied with by making affirmation in judicial form" has been part of our law since 1871. Rev. Stat. Sec. 1 (1873), based on Act of February 25, 1871, c. 71, 16 Stat. 431; *Bram v. United States*, 168 U.S. 532, 566.

In *Petition of Plywacki*, 205 F. 2d 423 (9th Cir. 1953), reversing 107 F. Supp. 593 (D. Hawaii, 1952), the Government confessed error after the District Court decided that the words "So Help Me God" in the oath of allegiance for naturalization required a belief in God as a condition for naturalization. The Government's confession of error was based on 1 U.S.C. § 1, *supra*.³

Statutes prescribing the form of an oath are not intended to impose an inflexible formula admitting of no deviation in words, but are intended rather to direct and point out the essential matter to be embraced in an oath (20 R.C.L. 508), and it has generally been held that a substantial compliance with the requirements of a statute prescribing the form of oath to be administered is sufficient.⁴

The crux of the appellee's argument on this point depends on whether the words "So Help Me God" in an oath are a substantive part of the oath itself or merely part of the ceremony of administering the oath.

A California decision has given the answer in clear and unequivocal terms:

³ The District Court did not give up lightly, 115 F. Supp. 613 (D. Hawaii, 1953). On a motion to transfer the petition, the District Court observed that the Court of Appeals had not examined the merits of the case. The petitioner, nonetheless, was finally naturalized by affirmation, in the District Court of Portland, Oregon on January 4, 1955, Vol. XX, A.C.L.U. of Northern California News, No. 2, February, 1955.

⁴ See Note 5, A. & E. Ann. Cas. 723; *State v. Collier*, 23 Wash. (2d) 678, 162 Pac. (2d) 267; *Hendrix v. State*, 50 Ala. 148; *State v. Owen*, 72 N.C. 605, 612.

"The words 'so help me God' are no part of the oath or thing sworn to—that the witness will tell the truth—for they do not extend the operation of the oath. They are part of the form and manner and pertain to the mode of administering it, and like kissing the Bible or raising the hand, are merely the sanction or pledge that the substance of the oath—the declaration to tell the truth—will be kept."

People v. Parent, 139 Cal. 600, 601, 73 Pac. 423.⁵

In its broadest sense, an oath includes any form of attestation by which a party signifies that he is bound in conscience to perform an act faithfully and truthfully.⁶

Since an affirmation is a solemn and formal declaration or affirmation that a person is telling the truth (*Black's L.D.* (1951), 4th Ed., 81), it would most certainly appear to be covered by the above definition as an oath. As Justice Graham said in *United States v. Amtorg*, 71 F. 2d 524, 530 (C.C.P.A. 1934);

"That an affirmation is equivalent to an oath is well settled. The Constitution makes it so in the oath of the President, article 2, sec. 1; when the Senate tries impeachments, article 1, section 3, and in the oaths of State and United States officers, article 6."

It is true that definitions of oaths used to be framed in religious terms: i.e., an appeal by a person to God to witness the truth of what he has declared (*Blackburn v. State*, 71 Ala. 319, 321, 46 Am. Rep. 323, 39 Am. Jur. 494) or an imprecation of divine punishment or vengeance

⁵ See also: *Lancaster etc. R. Co. v. Keaton*, 8 E. & B. 952, 955, 92 E.C.L. Rep. 952, 120 Reprint 354; *People v. Swist*, 136 Cal. 520, 69 Pac. 223; *State v. Hulsman*, 147 Iowa 572, 126 N.W. 700; *State v. Mazon*, 90 N. Car. 676.

⁶ *Black's L.D.* (1951), 4th Ed., 1220; *State ex rel. Braley v. Gay*, 59 Minn. 6, 60 N.W. 676; *In re Sage*, 24 Oh. Cir. Ct. (N.S.) 7; *Vaughn v. State*, 146 Tex. Cr. R. 586, 177 S.W. (2d) 59; *Spangler v. Dist. Ct.*, 104 Ut. 584, 140 Pac. (2d) 755; 67 C.J.S. 4.

on him if what he says is false (*Hudson v. State*, 207 Ark. 18, 22, 179 S.W. (2d) 165, 169). However, definitions of this kind ignore completely the reasons for oaths and, instead, sanctify form rather than substance.

"The purpose of an oath is to secure the truth and hence any form thereof which is ordinarily calculated to appeal to the conscience of the person to whom it is administered and by which he signified that his conscience is bound is sufficient."

State v. Hulsman, 147 Iowa 572, 573, 126 N.W. 700.⁷

At common law, it was felt that a person would not tell the truth unless he were afraid that some form of divine vengeance would be inflicted on him if he lied.⁸ But the tendency of modern constitutions, statutes, and court decisions is to abolish the religious test of the common law. (White, *Oaths in Judicial Proceedings*, 42 (N.S.) Am. Law Reg. 373 (1903), and appendix 446.)⁹

The appellee sets out a number of oaths in which the words "So Help Me God" are written out. He ignores the many oaths in which the language of the oath is like-

⁷ See also *State ex rel. Bruley v. Gay*, 59 Minn. 21, 60 N.W. 676; *O'Reilly v. People*, 86 N.Y. 154, 40 Am. Rep. 525.

⁸ McCormick, *Evidence* § 63 (1954). See 9 Holdsworth, *A History of English Law* 189-91 (1926); 9 Encyclopedia of the Laws of England, Oaths 248-52 (Renton ed. 1898). See criticism of this point of view by Bentham, *Swear Not at All* in *V Jeremy Bentham's Works* (Bowring Ed. 1843), 187.

⁹ See excellent Note, 36 N.Y.U. Law Review 513, 515 and footnotes; *Ashdown v. Manitoba Press Co.*, 6 Man. 578; *United States v. Amfory*, 71 Fed. (2d) 524 (C.C.P.A. 1934); *Gillars v. United States*, 182 Fed. (2d) 962 (2nd Cir. 1950).

England has allowed affirmation since the Oaths Act of 1888, "in the case of every person objecting to be sworn, and stating as the grounds of such objections, either that he has no religious belief or that taking of an oath is contrary to his religious beliefs." (51 & 52 Vict. c. 46.)

wise set out in *hanc verba*, but in which the words "So Help Me God" do not appear.¹⁰

¹⁰ *Members of State Legislatures and State Officers*: Every member of a State Legislature, and every executive and judicial officer of a State, shall, before he proceeds to execute the duties of his office, take an oath in the following form, to wit: "I, A. B. do solemnly swear that I will support the Constitution of the United States." Act of July 30, 1947 (61 Stat. 643, c. 389); 4 U.S.C. § 101.

Attorney Upon Admission to the Supreme Court Practice: "I, _____, do solemnly swear (or affirm) that I will demean myself, as an attorney and counsellor of this court, uprightly, and according to law; and that I will support the Constitution of the United States." Rules of the Supreme Court of the United States, Rule 5(4); 28 U.S.C. Appendix.

National Science Foundation Scholarship or Fellowship: "I do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America and will support and defend the Constitution and laws of the United States against all its enemies, foreign and domestic." Act of May 10, 1950 (64 Stat. 156 § 16(d) as amended by Act of April 5, 1952 (66 Stat. 43 C. 159) and as renumbered by Act of July 11, 1958 (72 Stat. 353 § 2 Public Law 85-510); 42 U.S.C. § 1874(d).

Similarly: *Armed Forces Enlistment Oath*, Act of August 10, 1956 (70A Stat., c. 1041); 10 U.S.C. § 501.

Cadet's on Admission to the Academy, Act of August 10, 1956 (70A Stat. 242); 10 U.S.C. § 4346(d).

National Guard Enlistment Oath, Act of August 10, 1956 (70A Stat. 602, ch. 1041); 32 U.S.C. § 304.

National Defense Education Act of 1958: Act of September 2, 1958 (72 Stat. 1602 § 1001(f); Public Law 85-864); 20 U.S.C., 1958 ed., § 581(f).

Officials of Puerto Rican Courts: Act of March 2, 1917 (39 Stat. 954 c. 145 § 10), as amended by Act of May 17, 1932 (47 Stat. 158 c. 190); 48 U.S.C. § 873.

Government Officials of the Virgin Islands: Act of July 22, 1954 (68 Stat. 509 c. 558 § 29); 48 U.S.C. 1958 ed., § 1543.

Civil Defense Officers and Employees: Act of January 12, 1951 (64 Stat. 1255 c. 1228 § 403(b), as amended by Act of March 5, 1952 (66 Stat. 13 c. 78 § 1(b)); 50 App. U.S.C., 1958 ed., § 2255(b).

Compare with the oaths required by the following acts of Congress, where "So Help Me God" is set out:

Further proof that "So Help Me God" is not a substantive part of an oath may be seen from the recent taking of the oath of office by President John F. Kennedy on January 20, 1961. The United States Constitution, Art. II, sec. 1(8), states the President before entering office shall take the following oath or affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

In spite of the fact that the words "So Help Me God" do not appear in this oath, President Kennedy added them at the end, as have probably all other Presidents. It could not seriously be contended that President Kennedy and all previous Presidents were not validly sworn into office because they took an oath of office other than the one set forth in the Constitution, i.e., by adding words not contained in the Constitutional oath. The only possible logical conclusion is that the words "So Help Me God" are not a substantive part of an oath.

Senators, Representatives, Members of State Legislatures, and others: Act of July 11, 1868, 15 Stat. 85.

Executive Departments and All Federal Officers: R. S. § 1757, as amended by Act of May 13, 1884 (23 Stat. 22, c. 46 §§ 2, 3); 5 U.S.C. § 16.

Postal Service: R. S. §§ 391, 392, as amended by Act of March 5, 1874 (18 Stat. 19 C. 46); 5 U.S.C. § 365.

Justices and Judges: Act of June 25, 1948 (62 Stat. 997, c. 646); 28 U.S.C. § 453.

Reserve Officers Training Corps (ROTC) Loyalty Oath: Act of July 7, 1960 (74 Stat. 353; Public Law 86-601).

Alien Physicians, Dentists and Allied Specialists Inducted and Appointed as Commissioned Officers: Act of June 29, 1953 (67 Stat. 86 § 1); 50 App. U.S.C. 1958 ed. § 457(i)(7). Universal Military Training & Service Act.

III. Denying Public Office to Those Who Refuse to Profess a Belief in God Infringes on Religious Freedom.

Appellee lightly dismisses the Hobson's choice he grants appellant. He is perfectly free, appellee says, to hold any belief whatsoever; he is merely denied a notary public commission if he refuses to make the required declaration.

We concede that there is no constitutional or inherent right to hold any type of public office, but there is a constitutional right not to be *barred* from public office by an arbitrary, unreasonable, unconstitutional requirement.

This Court has too many times had this argument presented in terms of "rights" and "privileges" and has always cut through such sophistry in discussing the problem. As Mr. Justice Frankfurter said in his concurring opinion in *Garner v. Board of Public Works*, 341 U.S. 716, 725: "To describe public employment as a privilege does not meet the problem." This Court has avoided becoming involved in a semantic discussion of whether a "right" or a "privilege" is involved, but, instead, has decided cases in far broader terms, mindful of its role in balancing vital interests going to the very heart of our society.

In *American Communications Assn. v. Douds*, 339 U.S. 384, the Court noted the governmental agency argument:

"The Board (NLRB) has argued on the other hand that Section 9(h) (the non-Communist oath) presents no First Amendment problem because its sole sanction is the withdrawal from non-complying unions of the 'privilege' of using its facilities." (p. 389.)

However, the Court would not accept this contention and stated:

"By exerting pressures on unions to deny offices to Communists and others identified therein, Section 9(h) undoubtedly lessens the threat to interstate commerce, but it has the further necessary effect of discouraging the exercises of political rights protected by the First Amendment." (Emphasis added.) (p. 393.)

In the case of *Frost v. Railroad Commission of California*, 271 U.S. 583, the Court posed the question before it in these terms:

"The naked question which we have to determine, therefore, is whether the state may bring about the same result (converting private carriers into public carriers against their will) by imposing the unconstitutional requirement as a condition precedent to the enjoyment of a privilege, which without so deciding we shall assume to be within the power of the state altogether to withhold if it sees fit to do so?" (p. 592.)

The Court answered its own question in words which are equally applicable to the requirement here involved:

"May it stand in the conditional form?"

"If so, constitutional guarantees so carefully guarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which though in form voluntary, in fact lacks none of the elements of compulsion. Having regard to the form alone, the act here is an offer to a private carrier of a privilege, which the state may grant or deny, upon a condition which the carrier is free to accept or reject.

"It would be a palpable incongruity to strike down an act of state legislation which by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under a guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold."

To a similar effect is *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 156 (1946), and the dissents of Mr. Justice Brandeis and Mr. Justice Holmes in *United States ex rel. Milwaukee Social Democrat Publishing Co. v. Burleson*, 225 U.S. 407, 421-423, 430-432, 437, 438: In *Speiser v. Randall*, 357 U.S. 513 (1958), the Court also refused to accept such a myopic approach to the problem.

When a person is placed under a disability because of his religious beliefs, or lack of them, then there is an im-

pairment of religious liberty. Whether the disability or requirement is a valid one is another question—but, certainly, the reality and practical effect of the so-called choice cannot be ignored.

Even if the materials relied on by appellee (Appellee's Brief, pp. 5-10) had the sweep which he ascribes to them, they would not confirm the validity of the holding of the Court below that the constitutional protection of religious liberty "does not encompass the ungodly" (R.T. 19). For acceptance of the premise that "we are a religious people,"¹¹ even if unqualified by definitional doubts,¹² does not support a denial of First Amendment liberties to non-believers. A further assumption is necessary: that the authors of the Bill of Rights intended to benefit only those who shared their opinions on religion and polity. But this Court has refused to ascribe such parochialism to the Founding Fathers. In *Girouard v. United States*, 328 U.S. 61, 68, the Court adopted the language of Mr. Justice Holmes, dissenting in *Schwimmer v. United States*, 279 U.S. 644, 654-5:

"... if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within this country."

¹¹ *Zorach v. Clauson*, 343 U.S. 306, 313. At pp. 16-20 of our opening brief we paid special attention to the *Zorach* case, because of the heavy reliance placed on it by the Court below. We there showed that the case does not authorize Maryland's action here, and, indeed, supports appellant. Appellee, though also relying on *Zorach* does not comment on this discussion (Appellee's Brief, pp. 10, 16).

¹² It is not insignificant that two of the cases cited by appellee go further and say that "We are a Christian people". *Church of the Holy Trinity v. United States*, 143 U.S. 457, 470; *United States v. MacIntosh*, 283 U.S. 605, 625 specifically overruled in *Girouard v. United States*, 328 U.S. 61. See also *Vidal v. Girard's Executors*, 2 How. 128, 198-201.

In no area of human opinion and controversy has the clash among "fighting faiths"¹³ been more intense, and the oppression more sustained than in that of religion. To the people of the thirteen original states, this historic truth (still tragically undiminished in our own time) was a matter of such importance that they insisted on the enactment of a Bill of Rights which would protect religious liberty and permanently separate church and State. *Everson v. Board of Education*, 330 U.S. 1 (1947). They intended to foreclose government forever from determining what is orthodox and, indeed, what is "religion." "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy . . ." *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624, 638. They knew, from the experience of centuries, that unless the ideas of all are safe, the ideas of none are. This very case proves the point again. The Court below (R.T. 19) and appellee in his brief (pp. 8, 9, 15) read Art. 36 and 37 of the Maryland constitution *in pari materia*. Thus, not only atheists, but all who doubt moral accountability to God are proscribed. "It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings." *West Virginia Bd. of Education v. Barnette*, *supra*, 319 U.S. at 641. The grudging concession of the Court below that, "We may assume that there may be permissible differences in the individual's conception of God" fails even to approximate the standard of religious liberty which the First Amendment made law.

Appellee also states that "This Court has on many occasions upheld state statutes which allegedly interfere with religious liberty, but the Court has never found such State action improper." (Appellee's Brief, p. 12). *Cantwell v. Connecticut*, 310 U.S. 296, *West Virginia Board of Education v. Barnette*, *supra*, and *Fowler v. Rhode Island*,

¹³ *Abrams v. United States*, 250 U.S. 616, dissenting opinion of Mr. Justice Holmes, p. 630.

345 U.S. 67, are three particularly apposite examples and are squarely to the contrary.

IV. Appellee's Position Rests on the Theory of the Rejected Meaning of the "Establishment of Religion" Clause.

The key to appellee's position is on page 17 of his brief in his quote from Cooley's *Principle of Constitutional Law*, where he states:

"By establishment of religion is meant the setting up or recognition of a state church or at least conferring upon one church of special favors and advantages which are denied to others."

From this it can be seen that the State of Maryland adheres to a point of view completely at variance to the meaning of the establishment-of-religion clause which this Court explicitly set forth in *Everson v. Board of Education*, *supra*, and to which it has adhered ever since. In *Everson* and in the subsequent cases of *McCollum v. Board of Education*, 333 U.S. 203 (1948) and *Zorach v. Clausen*, *supra*, there were two competing views on the meaning of the establishment clause presented to the court: one held the establishment clause merely prohibited the setting up of a single state church and thus discriminating against all others, while the other held that it prohibited any aid to all churches and religion even on a non-discriminatory basis. *Everson* laid this issue to rest, and, we trust, permanently, when the latter view was adopted.

Appellee agrees (Appellee's Brief, p. 15) that *Everson v. Board of Education*, *supra*, is critical on the establishment clause. He asserts, however, that "the activity of the State of Maryland . . . in requiring its public officers to express a belief in the existence of God or moral accountability to God do not in any way contravene any of the propositions" declared in that opinion. We submit that one sentence expressly, and the spirit of the entire passage, forbid absolutely what Maryland attempts to do:

"Neither [a state nor the Federal Government] can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion." 330 U.S. 1 at 16. (Emphasis added)

Maryland would require appellant to "profess a belief in [some] religion" to hold public office. It may not do so. "The 'establishment of religion' clause of the First Amendment means at least this." *Id.* at 15.

However, appellee leaps to the conclusion that if appellant's position in this case is correct, any verbal or oral recognition by the state or national government of the existence of God violates the First Amendment to the Constitution. Perhaps, but that is not the issue here. Recognition is not the problem, but *coerced* recognition is. These are two different problems.

There really is no effective way to stop a President from referring to God if he so desires in messages of the State of the Union nor the opening of the Court with the supplication "God Save the United States and this Honorable Court."¹⁴

Not only that, there is just no practical way to test the constitutionality of these practices. The assumption of constitutionality of statements by agencies of the federal or state government acknowledging the existence of God is unwarranted. A practice of unproved constitutionality should not be used to prove the constitutionality of another practice.

V. The Religious Test Oath Denies Appellant the Equal Protection of the Law.

Since by what has already been said appellant has proved that Maryland's test oath denies him religious liberty, and violates the "establishment" clause, it would be no defense to Maryland even if the test oath were a reasonable classi-

¹⁴ Pfeffer, *op. cit.*, pp. 206-9.

fication. One constitutional prohibition is enough. But appellee's efforts to sustain the reasonableness of the oath are readily disposed of; indeed, they have already been answered in large measure by this Court:

"Of course, if such discrimination were purely arbitrary, oppressive or capricious, and made to depend upon differences of color, race, nativity, *religious opinions*, political affiliations or other considerations having no possible connection with the duties of citizenship as taxpayers, such exemption would be pure favoritism, and a denial of the equal protection of the laws." *American Sugar Refining Co. v. Louisiana*, 179 U.S. 89, 92. (Emphasis added.)

Religious opinions have no more connection with capacity for public office than they have with taxpaying. Appellee contends that there is such a nexus because of the oath-administering function of the notary public (R.T. 19). The "paradox" which appellee posits is entirely contrived. Appellant does not disavow "the sanctity of the very oath he administers". This very proceeding was necessitated by his refusal to swear falsely and hypocritically to a belief he does not hold. Atheists as a class are no less worthy of belief than those whose oath invokes divine sanctions—as the overwhelming majority of states have recognized in removing from atheists the common law disqualification as witnesses.

Appellee urges also that the Fourteenth Amendment does not limit the states in fulfilling public office (Appellee's Br., p. 18). *Snowden v. Hughes*, 321 U.S. 1, does not so hold. On the contrary, it was there said that "Where discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights." *Id.* at 11. In *Taylor v. Beckman*, 178 U.S. 548, on which appellee relies heavily (Appellee's Br., pp. 11, 18) it was indeed said that public office is not "property" within the Fourteenth Amendment. But while the case has not been formally overruled, recent decisions imposing constitu-

tional limits on the states' power to prescribe qualifications and conditions for public office have drained this abstract proposition of all practical consequence.

VI. The "No Religious Test" Clause of Article 6 of the United States Constitution Was Raised in the Court Below.

The Court of Appeals stated incorrectly that "The appellant does not contend that clause three of Article VI of the Federal Constitution is applicable to the States." (R.T. 17) but went on to rule that it was "clearly inapplicable" in any case.

The Article VI argument has been made consistently since the case began. It was urged in the original complaint for mandamus.¹⁵

It was urged on the Court of Appeals by the American Civil Liberties Union as *Amicus Curiae*.¹⁶

It was not included in the brief of appellant simply because the Chief Judge of the Maryland Court of Appeals wrote the American Civil Liberties Union granting its request to file an *amicus* brief, but urging that all "unnecessary duplication be avoided."¹⁷

In *Eaton v. Price*, 360 U.S. 246, affirmed by the Court in a 4 to 4 decision, the federal constitutional ground of violation of the Fourteenth Amendment was raised in the Court below, the Ohio Supreme Court, only by the Ohio Civil Liberties Union, and the Dayton Chapter, Civil Liberties Union, in their *amicus curiae* brief.¹⁸ None of the Jus-

¹⁵ R. T. 4, para. 12.

¹⁶ See Point Four of *Amicus* Brief of American Civil Liberties Union, pp. 11-13, a copy of which is herewith lodged with the Court.

¹⁷ See letter dated February 8, 1960, by Chief Judge Frederick W. Brune of the Maryland Court of Appeals, appendix A herein.

¹⁸ See Appellant's Substitute Brief on Merits, *The State ex rel. Eaton v. Price, Chief of Police*, No. 30, October Term, 1959, p. 25, and Appendix, p. 47.

tices of this Court raised the question of whether the federal constitutional question had been abandoned because of that circumstance.

In *Raley v. Ohio*, 360 U.S. 423 (1959), the Court stated that "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." See *Manhattan L. Ins. Co. v. Cohen*, 234 U.S. 123 [p. 436]. Here the Maryland Court of Appeals did rule on the "religious test" clause of the Constitution, by stating it was "clearly inapplicable." (R.T. 17)

Respectfully submitted,

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APPENDIX A

March 23, 1961.

These are copies of letters on file in the office of the Clerk of the Court of Appeals of Maryland.

J. LLOYD YOUNG,
Clerk.

February 8, 1960.

Lawrence Speiser, Esq.,
Attorney for
American Civil Liberties Union,
1613 Eye Street, N. W.,
Washington 6, D. C.

Re: Torcaso v. Watkins, #199, Sept. Term, 1959

Dear Sir:

Mr. J. Lloyd Young, Clerk of the Court of Appeals, has referred to me your letter of January 20 in which you request permission to file an *amicus curiae* brief on behalf of the American Civil Liberties Union in support of the appellant's position. Such a brief may be filed. I assume, of course, that at least one of the counsel submitting the same will be a member of the Maryland Bar.

I am advised that the brief of the appellant is to be filed not later than March 1st, and the brief of the appellee is to be filed twenty days thereafter. I would suggest that in order to avoid unnecessary duplication you examine the brief for the appellant. With that in mind and in order that the Attorney General may have before him the briefs submitted on behalf of *amici curiae* before filing his brief, I think that each *amicus* brief should be filed on or before March 15, 1960.

For your information, Max Gressman, Esq., Attorney for American Ethical Union, 551 Fifth Avenue, New York 17, N. Y., has also requested permission to file an *amicus*

brief. Perhaps you will wish to communicate with him with regard to the contents of your brief.

Very truly yours,

/s/ FREDERICK W. BRUNE,
Chief Judge.

FWB/IB

CC: HON. C. FERDINAND SYBERT,
Attorney General of Maryland,
STEDMAN PRESCOTT, JR., Esq.,
Deputy Attorney General,
JOSEPH A. SICKLES, Esq.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1960

No. 373

ROY R. TORCASO,

Appellant.

v.

CLAYTON K. WATKINS,

CLERK OF THE CIRCUIT COURT FOR MONTGOMERY
COUNTY, MARYLAND

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF MARYLAND

**MEMORANDUM SUBMITTED AT THE
REQUEST OF THE COURT**

THOMAS B. FINAN,

Attorney General of Maryland.

JOSEPH S. KAUEMAN,

Deputy Attorney General
of Maryland.

Suite 1201, 10 Light Street,
Baltimore 2, Maryland.

For Appellee.

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ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF MARYLAND.

**MEMORANDUM SUBMITTED AT THE
REQUEST OF THE COURT**

TO THE HONORABLE, THE JUSTICES OF SAID COURT:

This memorandum is submitted pursuant to the request of the Chief Justice at the oral argument of this cause, and is limited to the question of whether the action instituted by the Appellant becomes moot by reason of the fact that the term of office which he seeks expires on May 1, 1961.

STATEMENT OF POLICY

The Attorney General of Maryland wishes to state unequivocally that it is the desire of the State of Maryland to have the issues which are presented by this cause, and which were fully briefed and argued in this Court, determined. The issues presented are substantial and important to the public interest. It is not the desire of the Attorney General of Maryland to present any undue obstacle to the decision of this case, but he believes that a statement of the applicable law should be given to the Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article II, Section 13, of the Constitution of Maryland provides as follows:

"All civil officers appointed by the Governor and Senate, shall be nominated to the Senate within fifty days from the commencement of each regular session of the Legislature; and their term of office, except in cases otherwise provided for in this Constitution, shall commence on the first Monday of May next ensuing their appointment, and continue for two years, (unless removed from office), and until their successors, respectively, qualify according to Law."

Article 68, Section 1, Annotated Code of Maryland (1960 Supplement) provides as follows:

"The Governor on the approval of the application by the Senator of the county or legislative district of Baltimore City in which the applicant resides, shall appoint and commission in his discretion and judgment any number of persons, male or female, of known good character, and integrity and abilities, citizens of the United States, and who have resided in this State two (2) years previous to their appointment

as notaries public for the State of Maryland; provided that such residence requirement shall not be applicable to persons appointed as an official court reporter by any court of Baltimore City.

"No distinction shall be made between male or female applicants, who shall take the oath of office before the clerk of the circuit court for each of the counties in the State, and the clerk of the Superior Court in Baltimore City, respectively, and shall receive a commission signed by the Governor and Secretary of State under the great seal of the State. They shall pay the sum of five (\$5) dollars for each commission so issued, to the treasury of the State of Maryland, and the further sum of fifty cents (50¢) to the clerk for the registration of the name and address of each of the said notaries public."

STATEMENT OF FACTS

The Appellant in proper form made application for the office of Notary Public in and for Montgomery County, State of Maryland. The application was properly endorsed by the Honorable Edward S. Northrop, State Senator from Montgomery County, Maryland, and forwarded by him to the Governor of the State. On or about the 22nd of June, 1959, the Governor signed, and the Secretary of the State of Maryland attested, a commission to the Appellant as a Notary Public in and for Montgomery County, State of Maryland. According to the commission docket of the Circuit Court of Montgomery County (Page 128), the commission was received by the clerk on June 23, 1959. The docket further shows that the Appellant "refused to qualify because he did not believe in God", and the commission was thereupon returned to the Secretary of State of Maryland on July 28, 1959, and was destroyed. A specimen of the commission is attached hereto and prayed to be made a part hereof. It clearly appears from the speci-

men commission that the terms of office of the Notaries Public expire May 1, 1961.

The Appellant in his petition for a writ of mandamus prays as follows:

"1. That a Writ of Mandamus be issued, directed to Clayton K. Watkins, as Clerk of the Circuit Court for Montgomery County, State of Maryland, commanding him to perform his duties as Clerk of said Court and render to your petitioner the Oath or affirmation as set forth in Article I Section 6 of the Constitution of the State of Maryland and upon your petitioner's swearing or affirming thereof, the said Clerk be further commanded to issue to your petitioner his Commission as Notary Public in and for Montgomery County, State of Maryland."

The Attorney General of Maryland has been advised by the Honorable Edward S. Northrop, State Senator from Montgomery County, Maryland, that the Appellant has requested to be reappointed, and that Senator Northrop has further advised that he has certified and forwarded to the Governor the name of the Appellant for appointment as a Notary Public for a term commencing on May 1, 1961, and ending on the first Monday of May, 1963. The Governor of Maryland, after having been apprised of these proceedings and the question that the issues presented may possibly be moot, has advised the Attorney General that, in order to keep these proceedings in their present status, he, the Governor of Maryland, will in due course issue another commission to the Appellant as a Notary Public.

STATEMENT OF THE LAW

In *State of Tennessee, ex rel. Maloney v. Condon*, 189 U.S. 64, a writ of error to review the judgment of the Supreme Court of Tennessee, which affirmed decrees of

the Chancellor and the Court of Chancery Appeals dismissing a bill in an action for usurpation of office, was dismissed on the ground that the terms of office of the relators originally elected by the county court and of the defendants had expired. It was alleged by the persons superseded in public office by an act of the General Assembly that the act was unconstitutional. This Court said:

"If we were to hold that the act could be subjected to the test of the 14th Amendment, and that it could not stand that test, we should do nothing more than reverse the decree below and remand the cause, and, as such a judgment would be ineffectual, we must decline to intimate any opinion on the subject.

"The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal.' Mr. Justice Gray, *Mills v. Green*, 159 U.S. 651, 653, 40 L. ed. 293, 294, 16 Sup. Ct. Rep. 133."

It was held that the writ of error came within the rule above quoted and it was therefore dismissed.

See also *Shaffer v. Howard*, 249 U.S. 200, where an appeal from a decree refusing to enjoin a state auditor and a county sheriff from enforcing a tax levied under the law of Oklahoma on the ground of the repugnancy of such tax to the Constitution of the United States, and where the

terms of office of the defendant officials had expired and their successors had qualified but there was no law in Oklahoma authorizing a revival or continuance of the cause of action against such successors, was dismissed (249 U.S. 201). This Court said that:

"* * * it follows that the controversy has become merely moot, and that we have no authority to further consider or dispose of it."

The decree below was reversed and the cause remanded with directions to dismiss the bill for want of proper parties.

Respectfully submitted,

THOMAS B. FINAN,
Attorney General of Maryland,

JOSEPH S. KAUFMAN,
Deputy Attorney General
of Maryland, .

For Appellee.

SUPREME COURT OF THE UNITED STATES

No. 373.—OCTOBER TERM, 1960.

Roy R. Torcaso, Appellant,
v.
Clayton K. Watkins, Clerk of
the Circuit Court for Mont-
gomery County, Maryland.

On Appeal from the
Court of Appeals of
Maryland.

[June 19, 1961.]

MR. JUSTICE BLACK delivered the opinion of the Court.

Article 37 of the Declaration of Rights of the Maryland Constitution provides:

"[N]o religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God"

The appellant Torcaso was appointed to the office of Notary Public by the Governor of Maryland but was refused a commission to serve because he would not declare his belief in God. He then brought this action in a Maryland Circuit Court to compel issuance of his commission, charging that the State's requirement that he declare this belief violated "the First and Fourteenth Amendments to the Constitution of the United States" The Circuit Court rejected these federal constitutional contentions, and the highest court of

¹ Appellant also claimed that the State's test oath requirement violates the provision of Art. VI of the Federal Constitution that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." Because we are reversing the judgment on other grounds, we find it unnecessary to consider appellant's contention that this provision applies to state as well as federal offices.

the State, the Court of Appeals, affirmed,² holding that the state constitutional provision is self-executing and requires declaration of belief in God as a qualification for office without need for implementing legislation. The case is therefore properly here on appeal under 28 U. S. C. § 1257 (2).

There is, and can be, no dispute about the purpose or effect of the Maryland Declaration of Rights requirement before us—it sets up a religious test which was designed to and, if valid, does bar every person who refuses to declare a belief in God from holding a public “office of profit or trust” in Maryland. The power and authority of the State of Maryland thus is put on the side of one particular sort of believers—those who are willing to say they believe in “the existence of God.” It is true that there is much historical precedent for such laws. Indeed, it was largely to escape religious test oaths and declarations that a great many of the early colonists left Europe and came here hoping to worship in their own way. It soon developed, however, that many of those who had fled to escape religious test oaths turned out to be perfectly willing, when they had the power to do so, to force dissenters from their faith to take test oaths in conformity with that faith. This brought on a host of laws in the new Colonies imposing burdens and disabilities of various kinds upon varied beliefs depending largely upon what group happened to be politically strong enough to legislate in favor of its own beliefs. The effect of all this was the formal or practical “establishment” of particular religious faiths in most of the Colonies, with consequent burdens imposed on the free exercise of the faiths of nonfavored believers.³

² 223 Md. 49, 162 A. 2d 438. Appellant's alternative contention that this test violates the Maryland Constitution also was rejected by the state courts.

³ See, e. g., 1 Stokes, Church and State in the United States, 358-446. See also cases cited, note 7, *infra*.

- o There were, however, wise and far-seeing men in the Colonies—too many to mention—who spoke out against test oaths and all the philosophy of intolerance behind them. One of these, it so happens, was George Calvert (the first Lord Baltimore), who took a most important part in the original establishment of the Colony of Maryland. He was a Catholic and had, for this reason, felt compelled by his conscience to refuse to take the Oath of Supremacy in England at the cost of resigning from high governmental office. He again refused to take that oath when it was demanded by the Council of the Colony of Virginia, and as a result he was denied settlement in that Colony.* A recent historian of the early period of Maryland's life has said that it was Calvert's hope and purpose to establish in Maryland a colonial government free from the religious persecutions he had known—one "securely beyond the reach of oaths"

* The letter from the Virginia Council to the King's Privy Council is quoted in Hanley, *Their Rights and Liberties* (Newman Press 1959), 65, as follows:

"According to the instructions from your Lordship and the usual course held in this place, we tendered the oaths of supremacy and allegiance to his Lordship [;] [Baltimore] and some of his followers, who making profession of the Romish Religion, utterly refused to take the same. . . . His Lordship then offered to take this oath, a copy whereof is included . . . but we could not imagine that so much latitude was left for us to decline from the prescribed form, so strictly exacted and so well justified and defended by the pen of our late sovereign, Lord King James of happy memory Among the many blessings and favors for which we are bound to bless God . . . there is none whereby it hath been made more happy than in the freedom of our Religion . . . and that no papists have been suffered to settle their abode amongst us. . . ."

Of course this was long before Madison's great Memorial and Remonstrance and the enactment of the famous Virginia Bill for Religious Liberty, discussed in our opinion in *Everson v. Board of Education*, 330 U. S. 1, 11-13.

* Hanley, *op. cit.*, *supra*, p. 65.

When our Constitution was adopted, the desire to put the people "securely beyond the reach" of religious test oaths brought about the inclusion in Article VI of that document of a provision that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." Article VI supports the accuracy of our observation in *Girouard v. United States*, 328 U. S. 61, 69; that "[t]he test oath is abhorrent to our tradition." Not satisfied, however, with Article VI and other guarantees in the original Constitution, the First Congress proposed and the states very shortly thereafter adopted our Bill of Rights, including the First Amendment.* That Amendment broke new constitutional ground in the protection it sought to afford to freedom of religion, speech, press, petition and assembly. Since prior cases in this Court have thoroughly explored and documented the history behind the First Amendment, the reasons for it, and the scope of the religious freedom it protects, we need not cover that ground again.[†] What was said in our prior cases we think controls our decision here.

In *Cantwell v. Connecticut*, 310 U. S. 296, 303-304, we said:

"The First Amendment declares that Congress shall make no law respecting an establishment of religion

* "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[†] See, e. g., the opinions of the Court and also the concurring and dissenting opinions in *Reynolds v. United States*, 98 U. S. 145; *Davis v. Beason*, 133 U. S. 333; *Cantwell v. Connecticut*, 310 U. S. 296; *West Virginia State Bd. of Education v. Barnette*, 319 U. S. 624; *Fowler v. Rhode Island*, 345 U. S. 67; *Everson v. Board of Education*, 330 U. S. 1; *Illinois ex rel McCollum v. Board of Education*, 333 U. S. 203; *McGowan v. Maryland*, — U. S. —.

or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. . . . Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."

Later we decided *Everson v. Board of Education*, 330 U. S. 1, and said this at pages 15 and 16:

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"

While there were strong dissents in the *Everson* case, they did not challenge the Court's interpretation of the First Amendment's coverage as being too broad, but thought the Court was applying that interpretation too narrowly to the facts of that case. Not long afterward, in *Illinois ex rel. McCullom v. Board of Education*, 333 U. S.

203, we were urged to repudiate as dicta the above-quoted *Everson* interpretation of the scope of the First Amendment's coverage. We declined to do this, but instead strongly reaffirmed what had been said in *Everson*, calling attention to the fact that both the majority and the minority in *Everson* had agreed on the principles declared in this part of the *Everson* opinion. And a concurring opinion in *McCullom*, written by MR. JUSTICE FRANKFURTER and joined by the other *Everson* dissenters, said this:

"We are all agreed that the First and Fourteenth Amendments have a secular reach far more penetrating in the conduct of Government than merely to forbid an 'established church.' . . . We renew our conviction that 'we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion.' " *

The Maryland Court of Appeals thought, and it is argued here, that this Court's later holding and opinion in *Zorach v. Clauson*, 343 U. S. 306, had in part repudiated the statement in the *Everson* opinion quoted above and previously reaffirmed in *McCullom*. But the Court's opinion in *Zorach* specifically stated: "We follow the *McCullom* case." 343 U. S., at 315. Nothing decided or written in *Zorach* lends support to the idea that the Court there intended to open up the way for government, state or federal, to restore the historically and constitutionality discredited policy of probing religious beliefs by test

* 333 U. S., at 213, 232. Later, in *Zorach v. Clauson*, 343 U. S. 306, 322, MR. JUSTICE FRANKFURTER stated in dissent that "[t]he result in the *McCullom* case . . . was based on principles that received unanimous acceptance by this Court, barring only a single vote."

oaths or limiting public offices to persons who have, or perhaps more properly, profess to have a belief in some particular kind of religious concept.*

We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws nor impose requirements which aid all religions as against non-believers,¹⁰ and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.¹¹

* In one of his famous letters of "a Landholder," published in December 1787, Oliver Ellsworth, a member of the Federal Constitutional Convention and later Chief Justice of this Court, included among his strong arguments against religious test oaths the following statement:

"In short, test-laws are utterly ineffectual: they are no security at all; because men of loose principles will, by an external compliance, evade them. If they exclude any persons, it will be honest men, men of principle, who will rather suffer an injury, than act contrary to the dictates of their consciences. . . ." Quoted in Ford, *Essays on the Constitution of the United States*, 170. See also 4 Elliot Debates in the Several State Conventions on the Adoption of the Federal Constitution, 193.

¹⁰ In discussing Article VI in the debate of the North Carolina Convention on the adoption of the Federal Constitution, James Iredell, later a Justice of this Court, said:

" . . . [I]t is objected that the people of America may, perhaps, choose representatives who have no religion at all, and that pagans and Mahometans may be admitted into offices. But how is it possible to exclude any set of men, without taking away that principle of religious freedom which we ourselves so warmly contend for?"

And another delegate pointed out that Article VI "leaves religion on the solid foundation of its own inherent validity, without any connection with temporal authority; and no kind of oppression can take place." 4 Ellhott, *op. cit., supra*, at 194, 200.

¹¹ Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism,

In upholding the State's religious test for public office the highest court of Maryland said:

"The petitioner is not compelled to believe or disbelieve, under threat of punishment or other compulsion. True, unless he makes the declaration of belief he cannot hold public office in Maryland, but he is not compelled to hold office."

The fact, however, that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution. This was settled by our holding in *Wieman v. Updegraff*, 344 U. S. 183. We there pointed out that whether or not "an abstract right to public employment exists," Congress could not pass a law providing "... that no federal employee shall attend Mass or take any active part in missionary work." ¹²

This Maryland religious test for public office unconstitutionally invades the appellant's freedom of belief and religion and therefore cannot be enforced against him.

The judgment of the Supreme Court of Maryland is accordingly reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE FRANKFURTER and MR. JUSTICE HARLAN concur in the result.

Taoism, Ethical Culture, Secular Humanism and others. See *Washington Ethical Society v. District of Columbia*, 249 F. 2d 127; *Fellowship of Humanity v. County of Alameda*, 153 C. A. 2d 673, 315 P. 2d 394; II *Encyclopaedia of the Social Sciences* 293; 4 *Encyclopaedia Britannica* (1957 ed.) 325-327; 21 *id.*, at 797; Archer, *Faiths Men Live By* (2d ed. revised by Purinton), 120-138, 254-313; 1961 *World Almanac* 695, 712; *Year Book of American Churches for 1961*, at 29, 47.

¹² 344 U. S., at 191-192, quoting from *United Public Workers v. Mitchell*, 330 U. S. 75, 100.